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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

FRANK G. WATSON, PETITIONER

vs.

NEVADA NATIONAL BANK, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OCTOBER TERM, 1975

FRANK C. MATSON, PETITIONER

vs.

NEVADA NATIONAL BANK, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

FRANK G. WATSON, PETITIONER

vs.

NEVADA NATIONAL BANK, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner FRANK G. WATSON respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 9, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 9, 1973. A timely petition for rehearing was denied on May 25, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the language of F.R.App.P. 4(a) allowing, upon a showing of excusable neglect, an extension of an additional 90 days for filing a notice of appeal, requires an application for extension of time and order to be made within the original 30 day period prescribed by Rule 4(a) for taking an appeal.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 5, 1971. A timely petition for rehearing was denied on May 25, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Federal Rule of Appellate Procedure 4(a):[1]

> "Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; ... Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

1/ The Rule is a creation of statute: See: 28 U.S.C. Section 2072, and Order of the Supreme Court of the United States Adopting and Amending Rules, December 4, 1967.

Federal Rule of Appellate Procedure

STATEMENT OF THE CASE

A diversity suit seeking damages and a permanent injunction was filed by petitioner Watson against respondent Nevada National Bank, petitioner seeking and obtaining a temporary restraining order from the United States District Court for the Eastern District of California at Sacramento, California, against the Bank's attempted foreclosure upon land in the Eastern District of California. After a ten day non-jury trial, a permanent injunction issued against the Bank, but Watson was denied damages and attorney's fees. Judgment of the District Court was entered and timely motions under F.R.Civ.P. 50(b), 52(b) and 59 were filed, seeking directed verdicts, judgment notwithstanding verdict, amendment of findings and new trial.

The motions automatically tolled the time to appeal, pursuant to F.R.App.P. 4(a).

Hearing on the motions was held by the United States District Court on December 18, 1972. Entry of the judgment denying the motions was made on December 20, 1972. Although notice of entry of judgment is required by F.R.Civ.P. 77(d), no notice was ever made and forwarded by the clerk.

For this reason and others, an application under F.R.App.P. 4(a) to extend the time to file the notice of appeal due to excusable neglect was made by petitioner Watson on February 12, 1973 to the District Court. Supported by affidavit and served upon opposing counsel, it was subsequently granted by the District Court without opposition. The Notice of Appeal was filed concurrently with the order granting the extension.

The original 30 day period under F. R.App.P. 4(a) within which to file the notice of appeal began to run upon entry of the orders denying the motions made under F.R.Civ.P. 50(b), 52(b) and 59, on December 20, 1972. The 30 day period expired January 19, 1973. The 30 day "excusable neglect" additional period allowed by Rule 4(a) expired February 19, 1973. The application for extension of time was typed and served on opposing counsel on February 15th (the 54th day), and the order granting the extension filing the notice of appeal was on February 15, 1973, still within the 60 day period.

Approximately a month later respondent Bank moved in the United States Court of Appeals for the Ninth Circuit to dismiss the appeal. The Ninth Circuit, on April 9, 1973, entered an order as follows:

"The appeal is dismissed." (Appendix, Page 1.)

A timely petition for rehearing was filed, and on May 8, 1973, the court, pursuant to Rule 40, F.R.App.P., requested a response from counsel.

On May 25, 1973, the court entered the following order:

> "Appellant has petitioned for a rehearing, following the court's dismissal of the appeal on April 9, 1973. The petition and response have been considered.
>
> "The petition is denied on the authority of North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951 (9th Cir. 1952)." (Appendix, Page 2.)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE TIME WITHIN WHICH AN APPLICATION FOR EXTENSION OF TIME BASED UPON EXCUSABLE NEGLECT MUST BE MADE UNDER FEDERAL RULE

OF APPELLATE PROCEDURE 4(a).

The Court of Appeals for the Ninth Circuit, after reviewing this matter under petitioner's petition for rehearing, rested its dismissal upon North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951 (9th Cir. 1952). North Umberland, it is suggested, rests upon the premise that since the district court cannot extend the date for filing a notice of appeal to a day more than 30 days after the expiration of the time for appeal, it would seem that an extension must be both sought and granted within the original 30 day period. The clear implication of North Umberland, supra, and Cohen v. Plateau Natural Gas Co., 303 F.2d 273 (10th Cir. 1962), is that the original 30 day period having elapsed without an extension being sought and obtained, the district court had no power to grant an

extension. The Third Circuit, in Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275, 278 (3rd Cir. 1962), joined the Ninth and Tenth Circuits, holding explicitly that the district court possessed no power to grant relief if application had not been made in the first 30 day period. Unlike the Ninth Circuit, however, ten years later the Third Circuit explicitly overruled this position: Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087,(3rd Cir. 1972).

Now the Tenth Circuit has modified its Cohen Rule, supra, in Way v. Gaffney, 434 F.2d 996 (10th Cir. 1970) to grant power to the district court to extend the appeal time outside the original 30 day period so long as all parties have notice and an opportunity to be heard. (Emphasis added.)

[One must assume in petitioner Watson's case that the "notice" or "ex parte" problem is not the basis of the Ninth Circuit's dismissal, for the application to extend time was served upon respondent, no opposition was forthcoming and no additional hearing was ever requested by respondent in the District Court. Former F.R.Civ.P. 73(a), upon which North Umberland and Cohen, supra, and Plant Economy, Inc., infra, are based, had no language regarding notice. Present Rule 4(a), F.R.App.P. allows such notice as the district court requires, and there is no contention that the respondent was denied any right to be heard in the district court. Should the Ninth Circuit's dismissal here be based upon the notice aspect, we suggest the same problem of conflict in the circuits. If the basis of the Ninth Circuit's order is not suffi-

ciently definitive, the case should be remanded with directions to the circuit court to state the precise ground - either lack of notice or power to grant relief.]

The Second Circuit has held that an extension applied for outside the original 30 day period can be granted outside the 30 day limitation. C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952, 954-5 (2nd Cir. 1968).

The Sixth Circuit, in Reed v. People of the State of Michigan, 398 F.2d 800 (6th Cir. 1968), the Fourth Circuit in the cases of Evans v. Jones, 366 F.2d 772 (4th Cir. 1966), and Chinese Maritime Trust, Ltd. v. Carolina Shipping Co.,456 F.2d 192 (4th Cir. 1972), and the First Circuit, in Pasquale v. Finch, 418 F.2d 627 (1st Cir. 1969), have held that notices filed outside the original 30 day period can be validly entered by the

district court.[2/]

The Ninth Circuit's North Umberland decision, supra, was rendered upon interpretation of former F.R.Civ.P. 73; the circuit has not had occasion to review the decision under F.R.App.P. 4(a).

Professor Moore, in his Treatise, notes the conflict of decisions and does not agree with the "liberal" view of the First, Second, Third, Fourth, Sixth and Tenth Circuits. [9 Moore, Federal Practice, Para. 204.13(2), pp. 974-978, text and n.'s 9 and 10 (1973).] The Circuit Court, in Pasquale v. Finch, 418 F.2d 627 (1st Cir. 1969), expressly noted Moore's Treatise "opposition" at 418 F.2d 629.

2/ Gann v. Smith, 443 F.2d 353 (5th Cir. 1971) hints that, in a proper case, the extended 30 day period is a valid time within which to make the motion.

district courts.[2]

The Ninth Circuit's North Timberland decision, supra, was rendered upon interpretation of former F.R.Civ.P. 73; the circuit has not had occasion to review the decision under F.R.App.P. 4(a).

Professor Moore, in his Treatise, notes the conflict of decisions and does not agree with the "liberal" view of the First, Second, Third, Fourth, Sixth and Tenth circuits. (2 Moore, Federal Practice, Para. 203.11[2], pp. 3041-3043, text and n.'s 6 and 10 (1965).) The Circuit Court, in Cleveland v. Lamb, 214 F.2d 627 (1st Cir. 1954), extensively quoted Moore's Treatise "Opposition" at 213 F.2d 630.

---

[2] Rule 4, F.R.App.P., 28 U.S.C. (1965 Cir. Court Rules book). In a proper case, the reference to the notice is a valid time within which to make the motion.

It is interesting to note in this regard that Professor Moore comments:

> "It may be that on the precise facts this case and North Umberland Mining Co. v. Standard Acc. Inc. Co., n 3, supra, and Cohen v. Plateau Natural Gas Co., n 4, supra, should be decided differently today. In each case, the district court, at a time when the parties might have acted in a manner that would have protected their rights, i.e., might have proceeded by motion and notice, permitted them by its action to suppose that they had effectively protected those rights. There is a relatively recent line of Supreme Court decisions holding that under such circumstances the courts of appeals should not allow the distrist court's error to deprive the party of his right to appeal."
>
> 9 Moore, Federal Practice, Para. 204.13(2.), p. 975, n. 5.

The Supreme Court cases referred to are: Thompson v. Immigration & Naturalization Service, 375 U.S. 384, 11 L.Ed.2d 404 (1964), and Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 9 L.Ed. 261 (1962). See: 9 Moore, Federal

Practice, Para. 204.12(2), pp. 956-8.[3/]

The conflict in circuit decisions raises a serious problem in uniformly administering the portion of the Federal Rule of Appellate Procedure here involved. This Court has had occasion to address itself to the problem of "excusable neglect" in other contexts [e.g. Berman v. United States, 378 U.S. 530, 12 L.Ed.2d 1012 (1964)], but not to the question of the timing of the application for relief.

In view of the explicit and clear language now contained in Rule 4(a) that application may be made after the original 30 day period, upon motion and with

---

3/ The Seventh Circuit, in Files v. City of Rockford, 440 F.2d 811, 814 (7th Cir. 1971), has recognized this Court's admonition to give great deference to the district court's findings, thus joining in Professor Moore's view. No one challenges the excusable neglect finding in petitioner's case.

such notice as the district court may require, clarification of the issue presented here should be had.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

JERROLD M. LADAR
507 Polk Street, Suite 310
San Francisco, California

Counsel for Petitioner

August 22, 1973.

NO.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

10

FRANK G. WATSON,

Appellant,

vs.

NEVADA NATIONAL BANK, a Nevada corporation, JAMES E. PARDEE,

Appellees.

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73-1497

MOTION TO DISMISS APPEAL

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APR 2 1973
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U. S. COURT OF APPEALS

4/9/73.

The appeal is dismissed.

Samuel Brunson

Edward C. Wallace

Circuit Judges

Appendix 1

MAY 30 1973

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MAY 25 1973

DENNIS P. MATHEWS, CLERK
U. S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK G. WATSON,	)	
Appellant,	)	No. 73-1497
v.	)	
NEVADA NATIONAL BANK, a Nevada corporation, JAMES E. PARDEE,	)	ORDER
Appellees.	)	
	)	

Before: BROWNING and WRIGHT, Circuit Judges.

Appellant has petitioned for a rehearing, following the court's dismissal of the appeal on April 9, 1973. The petition and response have been considered.

The petition is denied on the authority of North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951 (9th Cir. 1952).

James R. Browning

Circuit Judges

W 5/24/73

No. Cal. 4/9/73
Br/W

Appendix 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

FRANK G. WATSON, PETITIONER

vs.

NEVADA NATIONAL BANK, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1973, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to David Warner Hagen, Esq., 102 Roff Way, Reno, Nevada 89501, Counsel for Respondent. I further certify that all parties required to be served have been served.

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